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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JON CIAURI, SR., et al., Defendants and Appellants.	B285436 (Los Angeles County Super. Ct. No. KA112630-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part, reversed in part and remanded with directions.

Lori Nakaoka for Defendant and Appellant Jon Ciauri, Sr.

Frederick L. Glasser for Defendant and Appellant Jon Ciauri, Jr.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Ciauri.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Surveillance video captured appellants Jon Ciauri, Sr. and Jon Ciauri, Jr. (Senior and Junior, respectively) jointly beating Armando Cruz at a gas station after Senior started a fight and Cruz fought back. The video further captured appellant Joseph Ciauri (Joseph) accompanying Senior and Junior, standing near Cruz as Senior escalated the confrontation, and remaining in position during the beating. Cruz told the police Senior threatened to kill him and his family if he reported the beating. The state charged all appellants with felony assault and battery and Senior with criminal threats and witness intimidation. Appellants retained attorney Albert Perez to defend all three of them and, after obtaining continuances to seek separate counsel, confirmed their intent to waive any conflict of interest arising from the joint representation. However, on the first day of trial, appellants requested substitution of three new attorneys, two of whom were neither present nor ready to proceed. The court denied their substitution request. At trial, the prosecution relied heavily on the surveillance video. Senior and Junior claimed to have acted to defend Senior from Cruz, and Perez argued Joseph was merely

present. A jury convicted Senior and Junior of felony assault and battery, convicted Joseph of the lesser included misdemeanor offenses of simple assault and simple battery, and acquitted Senior of the threats and intimidation charges. The court sentenced Joseph to summary probation, imposing conditions prohibiting his possession of deadly or dangerous weapons and authorizing searches of his person and property.

On appeal, all appellants contend: (1) the trial court's denial of their request for substitution of counsel infected their trial with structural error; (2) Perez's conflict of interest in representing all three men prejudiced the trial's outcome; and (3) the trial court's erroneous admission of gang membership evidence further prejudiced the outcome. Senior separately contends: (1) the trial court erroneously admitted evidence that Senior assaulted Cruz's daughter; and (2) the prosecutor committed misconduct during closing arguments. Junior separately contends insufficient evidence supported his convictions because the evidence compelled the jury to accept his "defense of another" defense. Finally, Joseph separately contends: (1) insufficient evidence supported his guilt as an aider and abettor; (2) the weapons and search probation conditions are unconstitutional and otherwise invalid; (3) his conviction for simple assault is invalid because he was also convicted, for the same conduct, of the greater offense of simple battery; and (4) he is entitled to 34 additional days of presentence conduct credit. Respondent disputes all of appellants' arguments except

Joseph's contentions that we should vacate his conviction for simple assault and award him 34 additional days of presentence conduct credit.

We affirm Senior's and Junior's judgments in their entirety, affirm Joseph's conviction for simple battery, and affirm Joseph's probation conditions. We reverse Joseph's conviction for simple assault and modify his sentence to award him an additional 34 days of presentence conduct credit.

STATEMENT OF THE CASE

The state charged each appellant with two felonies: assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)) and battery with serious bodily injury (*id.*, § 243, subd. (d)). It charged Senior with two additional felonies: criminal threats (*id.*, § 422, subd. (a)) and dissuading a witness rom reporting a crime (*id.*, § 136.1, subd. (b)(1)). It alleged appellants personally inflicted great bodily injury (*id.*, § 12022.7, subd. (a)) in committing the charged assault.

The jury convicted Senior on the assault and battery counts and found true the great bodily injury allegation. It acquitted him of making criminal threats and of dissuading a witness. The court sentenced Senior to five years in prison.

The jury convicted Junior on the assault and battery counts and found true the great bodily injury allegation. The court sentenced Junior to five years in prison.

The jury acquitted Joseph on the assault and battery counts but convicted him of lesser included offenses, viz., simple assault and simple battery (both misdemeanors). The court sentenced Joseph to a three-year period of summary probation, with credit for 35 days actually served. It imposed probation conditions forbidding Joseph to "own, use or possess any dangerous or deadly weapons, including any firearms, knives or other concealable weapons"; requiring Joseph to "submit [his] person and property to search and seizure at any time of the day or night, by any probation officer or other peace officer, with or without a warrant, probable cause or reasonable suspicion"; and requiring Joseph to "obey all laws and orders of the court . . . [and] all rules and regulations of the probation department."

Appellants timely appealed.

PROCEEDINGS BELOW

A. *Pretrial Continuances and Discussions of Joint Representation*

Appellants retained Albert Perez as their joint defense counsel. They signed a document titled "Conflict Waiver" stating, in relevant part, the following: "We have been explained by the Law Office of Albert Perez, Jr. that a potential for a conflict of interest is present because the Law Office of Albert Perez, Jr. will represent the three of us in a criminal matter and facts may arise against one of us, two of us or all three of us, which could or would create a conflict of interest and affect our individual rights. However, knowing

this, we have agreed to waive this potential conflict of interest and our rights to seek independent legal consultations and or representation. Additionally, the Law Office of Albert Perez, Jr. informs us that at any time, we may seek independent legal representation."

Appellants first appeared for arraignment before Judge Thomas A. Falls, approximately eight months before their trial. Junior and Joseph confirmed Perez had explained his potential conflict to them. Due to Junior's and Joseph's intent to seek separate counsel, the court continued arraignment for over a month (from December 22, 2016, to February 1, 2017).

On the first continued date of the arraignment, appellants appeared before Commissioner Wade D. Olson, who presided over all further pretrial proceedings. At Perez's request, for purposes of plea negotiations, the court agreed to continue the arraignment "one last time." The court continued arraignment for over a month (from February 1, 2017, to March 9, 2017).

On the second continued date of the arraignment, the court requested a status update regarding the potential conflict of interest. Perez told the court appellants, unable to separately afford retained counsel, were asking him to represent all three of them. The court stated it would have the public defender and alternate public defender speak with Junior and Joseph, and put the matter over to the end of the

calendar.[1] The court continued arraignment for over a month (from March 9, 2017, to April 17, 2017), again deeming it "the last time."

On the third continued date of the arraignment, Perez told the court there was no conflict of interest, and he would represent all three appellants. The court addressed appellants as follows: "Gentlemen, counsel is indicating there's not a conflict here. If you all agree, and so sign, and waive any conflicts that may arise, or that there is none, then I will go ahead and let Mr. Perez represent you all. But --" Senior interrupted the court, stating, "We've seen the evidence, Your Honor. We're confident." Junior and Joseph confirmed they joined Senior in waiving any conflict. The court instructed Perez to submit written confirmation of the waiver. The record includes no subsequent written waiver. After appellants pleaded not guilty to all charges and denied all special allegations, the court set dates for a readiness hearing and jury trial.

Appellants subsequently moved to continue trial due to outstanding discovery and Perez's unavailability. Over the prosecution's opposition, the court granted the motion. The court continued the readiness hearing and trial for approximately seven weeks (from June 22 and June 27, 2017, to August 14 and August 16, 2017).

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[1] The court's minute orders state defense counsel indicated Junior and Joseph "most likely [did] not qualify for the services of the public defender."

Two days before trial, at the continued readiness hearing, Perez indicated he might be unavailable on the trial date. The court declined to continue trial again but stated it would not request jurors for the trial date. Neither Perez nor appellants mentioned a conflict of interest or a desire to substitute counsel.

B. *Requests for Substitution of Counsel*

1. *Denial of Appellants' Day-of-Trial Substitution Request*

The prosecutor offered appellants a "package" plea deal two days before trial (August 14, 2017). On the morning of the first day of trial (August 16, 2017), appellants appeared with Perez and attorney Jamal Tooson. Tooson requested an order substituting him as counsel for Senior. He further requested that attorney Diana Aizman (not present) be substituted in as counsel for Junior, and that attorney Justin Sterling (also not present) be substituted in as counsel, presumably, for Joseph. Tooson, referring to appellants as "my clients," admitted that he had been contacted by appellants the previous evening, after the close of business.

The court denied the day-of-trial request as untimely. Senior addressed the court as follows: "Your Honor, it was based off of your reaction that you were surprised that we only had one lawyer." The court reminded Senior the issue had been under discussion for approximately eight months. The court deemed the substitution request a delay tactic,

emphasizing appellants' failure to make the request until the day of trial, after expressing readiness (aside from Perez's potential scheduling conflict) only two days before. The court transferred the case to Judge Bruce F. Marrs for trial.

2. *Adherence to Denial of Substitution Request*

On the afternoon of the first day of trial, Perez conveyed Tooson's desire to renew his "motion to substitute himself and two other lawyers in." Judge Marrs questioned Tooson's standing and stated he would not revisit an order already made by Commissioner Olson. The court noted Tooson was free to associate in with Perez, as he requested, but not to de facto represent any appellant. The court swore in the panel of prospective jurors and directed them to return the next day.

Upon the parties' return from a final plea negotiation session, Perez informed the court the terms of the package offer were acceptable to Junior and Joseph (who would receive 180 days of imprisonment and dismissal, respectively), but unacceptable to Senior (who would receive four years of imprisonment). Stating Junior and Joseph were "really concerned about their conflict [waiver] that they signed early on in this case," Perez renewed their request for substitution of counsel. He stated Tooson was immediately available -- this time to represent Joseph -- and Aizman would be available to represent Junior beginning at 1:30 p.m. the next day. He did not mention Sterling.

The court denied the renewed request. The court observed the potential conflict of interest had been covered in discussions before Commissioner Olson; appellants had waived the conflict with an understanding that "things like that could occur"; there had been no dramatic change of status; and the court had already ruled on the substitution request.

On the second day of trial (August 17, 2017), attorney Ira Kwatcher appeared to request a continuance on behalf of Sterling -- who had never appeared -- explaining that Sterling had "not seen any paperwork" but would be ready for trial 11 calendar days later. The court denied Kwatcher's request as untimely and observed it was unsure "the right hand knows what the left hand is doing." Aizman had not yet appeared, and Perez admitted he did not know who Aizman was. The court responded, "Therein lies part of the problem that I'm having. We have people who are clearly unprepared attempting to sub in on the first day and the second day of trial." Tooson argued he, at least, was prepared to go to trial without any continuance. The court once again reaffirmed its ruling upholding Commissioner Olson's order.[2]

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[2] The court denied motions for reconsideration filed separately by Perez and Tooson. Appellants challenged the denial of their substitution requests in a petition for writ of mandate, which we summarily denied.

C. *Prosecution Case*

1. *Cruz's Fear at Senior's Approach*

Before the prosecution presented its case, the court heard argument on appellants' Evidence Code section 402 motion to exclude, for lack of foundation, any evidence associating Senior with gang membership or activity. The prosecutor clarified it would offer Cruz's testimony regarding Senior's gang membership to shed light on Cruz's state of mind, viz., his sustained fear from the threat with which Senior was charged. The court denied the motion.

At trial, Cruz testified that on the day of the beating, he stopped at a gas station in Glendora with his 12-year-old son Nathan. Senior approached him. Cruz knew Senior through Senior's daughter Stephanie, who had lived with Cruz's family while she was dating his son "Mondo." Cruz felt concerned for his safety, in part because of the way Senior approached him.

Cruz also felt concerned because he had learned from Mondo and Stephanie that Senior was affiliated with a gang. After Perez objected to this testimony on foundation and hearsay grounds, the court overruled the objection and instructed the jury that the testimony was offered only to show Cruz's state of mind. Cruz then testified, without objection, that he knew Senior "and his sons" were gang-affiliated. He believed this in part because he had met Senior once before the gas station incident and had seen tattoos covering both of Senior's arms. Senior's sons were "all tatted" too.

A final reason for Cruz's concern was his knowledge that Senior had "roughed up" Cruz's daughter and threatened to kill her. The court sustained Perez's hearsay objections to this testimony. On cross-examination, Cruz again testified -- this time without objection -- that he feared Senior because of what Senior had done to his daughter.

2. *The Beating*

The prosecution presented testimony from Cruz, his son Nathan, and Glendora Police Corporal William Lee to establish the events of the beating, including each witness's testimony about surveillance video from the gas station. The video was played for the jury.[3]

The video, which had no audio, showed Senior and Cruz conversing as Cruz refueled his car and Junior and Joseph stood in their general vicinity. Joseph took up a position closer to Senior, who then pushed Cruz back against his car. As the two men continued to argue, Joseph briefly followed Junior to the other side of Cruz's car, then returned to his position near Cruz and Senior and remained there while Senior poked and swatted at Cruz. Senior briefly walked away while Joseph remained, gesturing at Cruz in a manner implying he was speaking to him. Senior returned and shoved Cruz in the back, after which Cruz shoved him in return. Senior then punched Cruz in the head. When Cruz punched him back, Junior leapt forward and began

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[3] The video is part of the record on appeal, and we have reviewed it.

pummeling Cruz in the head, hitting him repeatedly until he slumped down. Senior joined in Junior's assault on Cruz. Meanwhile, Joseph remained in position nearby and picked up Junior's hat for him when it fell. After picking up Junior's hat, Joseph took three short steps away from the beating, then returned to resume his position near Senior and Junior. In the direction Joseph was facing, a man moved to view the beating from behind a neighboring gas pump and a car abruptly stopped nearby. When the car's door opened, Senior and Junior stopped striking Cruz. Junior struck Cruz more than ten times before stopping.

In describing the assault, Cruz testified that he removed his glasses after Senior approached him because he feared Senior was going to punch him in the face. Senior then poked and shoved Cruz while accusing him of giving Stephanie a dirty look during a recent chance encounter. Joseph walked up close to the two men and told Cruz that he (Cruz), his son, and his daughter were bitches. Senior pushed Cruz from behind and, after Cruz pushed him in return, Senior punched Cruz in the head. Cruz punched Senior back and was then "brutally attacked" by both Junior and Senior.

Nathan's testimony was similar to his father's. Senior pushed Cruz first and threw the first punch. Joseph did not hit Cruz, but watched Senior and Junior beating him and picked up Junior's hat when it fell. Nathan called 911 and reported three men beating up his dad. The prosecutor played a recording of the 911 call for the jury.

Corporal Lee, who investigated the beating the day it occurred, testified that he reviewed the surveillance video before trial and observed Senior and Junior striking Cruz. He characterized Joseph's involvement, as shown on the video, as that of a "lookout." On cross-examination, he clarified he meant someone "there to alert . . . his accomplices . . . if police are coming, if other witnesses are coming, . . . so they can get out of there." He confirmed the video showed bystanders watched the beating.

3. *Senior's Alleged Threat*

Cruz testified that when appellants began to drive away in a rental truck, he wrote down the truck's license plate number and showed it to Senior. In response, Senior told Cruz that if he turned appellants in, Senior would kill him and his family. This threat placed Cruz in fear for his safety because of his knowledge of Senior's gang affiliation and of what Senior had done to him and to his daughter. The court overruled Perez's objection (on unspecified grounds) to Cruz's reference to Senior assaulting his daughter.

Nathan testified that he heard one of the men tell Cruz that if he turned them in, he and his family would be killed. On cross-examination, Nathan denied telling Corporal Lee that he had not heard any threat. Corporal Lee contradicted Nathan on that point, testifying that on the day of the beating, Nathan told him he had not heard anything the men said.

4. *Cruz's Text Message and Injuries*

Cruz testified that he sent Stephanie a text message immediately after the beating to tell her appellants had jumped him. Perez objected to the prosecutor's request to show the text message to the jury, on the ground that the prosecution had not disclosed the message in discovery. The court admitted into evidence a photograph of the text message, which conformed to Cruz's testimony and contradicted Perez's prediction, in his opening statement, that the evidence would show Cruz sent Stephanie a message threatening to "F" Senior up.

Cruz and Corporal Lee testified about Cruz's injuries, which included a puncture wound near his mouth and bruising on his cheeks. Cruz further testified that he obtained medical treatment for his injuries after driving from Glendora to Fresno to take Nathan to a wrestling competition. Photographs of Cruz's injuries and records of his treatment were admitted into evidence.

D. *Defense Case*

The defense called three witnesses: Stephanie, Senior, and Junior. Joseph did not testify.

Stephanie testified that Cruz's son Mondo abused her when they were dating. She once reported the abuse to Cruz, showing him a bruise on her eye, but he laughed and told her it was no big deal. Cruz liked to fight and had once been fired for fighting at work. When she informed him

Senior knew of Mondo's abuse, Cruz threatened to shoot Senior. On the day of the beating, after informing her by text message that appellants had jumped him, Cruz called her and threatened to "F" Senior up.

On cross-examination, Stephanie identified a statement written, at Senior's request, by her 11-year-old daughter Madelyn. Madelyn's statement read, in part, "To whom it may concern, . . . Mondo Cruz . . . verbally abused me and my mom. . . . I once witnessed him hitting my mom." The prosecutor, implying the excerpted language was too formal for a child of Madelyn's age, pressed Stephanie to admit that someone had dictated Madelyn's words. Stephanie testified that Madelyn alone wrote the statement.

In his testimony, Senior denied threatening Cruz, denied belonging to a gang, and denied hurting Cruz's daughter. He testified that he and Cruz, upon encountering each other at the gas station, fell into an argument about Mondo's abuse of Stephanie, during which Cruz showed an intent to fight by taking off his glasses, cursing, and saying he was unafraid. Cruz turned away from Senior after telling him Stephanie deserved the abuse. Intending to prompt Cruz to continue the conversation, Senior pushed Cruz in the back. Cruz then punched Senior twice, causing him to fall down. He was dazed, but Junior "came to [his] rescue."

Junior testified that Cruz acted aggressively from the moment appellants arrived at the gas station, as if ready to fight. Cruz called Stephanie a bitch and a whore and said she deserved Mondo's abuse. He then knocked Senior back

with a punch and stood over Senior, who looked dazed. Junior said he struck Cruz to save Senior from continued beating and from whatever else Cruz might do, such as retrieving a gun from inside his car. On cross-examination, Junior admitted hitting Cruz more than five times but said he did not believe he hit him more than ten times. As Junior concedes on appeal, the video showed him striking Cruz more than ten times.

E. *Closing Arguments*

Before closing arguments, the court instructed the jury. It instructed the jury, per CALJIC No. 2.09, not to consider evidence that had been admitted for a limited purpose for any other purpose.

1. *Prosecutor's Closing Argument*

The prosecutor argued the surveillance video and Cruz's injuries proved the assault and battery counts beyond a reasonable doubt. She argued the video disproved Senior's self-defense theory because it showed, inter alia, that Senior was the aggressor and that the beating lasted longer than could be justified by any perceived need for self-defense.

The prosecutor argued Joseph was guilty of the assault and battery as an aider and abettor. She reminded the jury of Cruz's testimony that Joseph called Cruz and his family bitches. She argued the video showed he boxed Cruz in and remained close to the beating to "provide [backup] if that

was needed." She further argued he "served as a lookout," reminding the jury of Corporal Lee's testimony.

The prosecutor argued the beating was motivated by Senior's desire to avenge Mondo's alleged abuse of Stephanie. She characterized it as "gangster justice." She reminded the jury of Cruz's testimony that Senior had threatened Cruz's daughter before, arguing it showed Cruz reasonably feared Senior's threat. She then reminded the jury of Cruz's belief that Senior was a gang member and his observation of gang tattoos on Senior's arms. She argued Senior's willingness to beat Cruz in clear view of other people told Cruz and the jury "what kind of man he is and how dangerous he is."

2. *Defense Closing Argument*

Perez argued Cruz and Nathan had provided willfully false testimony. Perez further argued Cruz was not credible because he had exhibited a hostile demeanor on the stand.

Perez argued Cruz demonstrated a willingness to fight by taking off his glasses and by texting and calling Stephanie after the fight. He reminded the jury of Senior's and Junior's testimony that Cruz told them Stephanie deserved Mondo's abuse. Attempting to corroborate Junior's testimony with still photographs from the video, Perez argued Junior acted to defend Senior.

Perez argued Joseph did not aid and abet the alleged crimes, reminding the jury that Cruz admitted Joseph never hit him. He argued the presence of bystanders with a clear

view of the incident discredited Corporal Lee's opinion that Joseph acted as a lookout.

3. *Prosecutor's Rebuttal Argument*

In rebuttal, the prosecutor argued defense counsel had resorted to attacking the credibility of prosecution witnesses because the facts, as established by the video and the law of self-defense, were unfavorable to appellants. She entreated the jury, "Please do not fall for their tricks. Do not let smoke be blown up your behinds. Because we know what happened that day."

The prosecutor argued Nathan's testimony was consistent with the video and with Cruz's testimony. She asked, "Can you imagine what that feels like to be inside a locked car, alone, helpless, and to see your dad getting beat on and to see him fall to the ground?" She commented, "When I asked him how long that felt like, he said it felt like it went on forever."

The prosecutor argued Stephanie's testimony was irrelevant because it did not concern what happened at the gas station. She further argued Stephanie's testimony was not credible because, inter alia, her allegations of abuse were not corroborated by other witnesses. Emphasizing the absence of corroborating testimony from Stephanie's daughter Madelyn, the prosecutor suggested the defense did not call Madelyn as a witness because it would have become clear the child had not actually written the statement accusing Mondo of abuse. She remarked the jury could not

know what happened in Stephanie's relationship with Mondo because "[a]nyone can get up there and lie to help somebody they love."

The prosecutor argued it was understandable that Cruz became upset on the stand because, inter alia, he heard people saying lies about him, including about what happened at his work. She argued Cruz's removal of his glasses showed no intent to fight, but instead an intent to avoid greater injury if struck in the face. She reminded the jury it had seen a photograph of injuries near Cruz's nose and asked the jury to imagine what would have happened if he had kept his glasses on.

The prosecutor commented on Cruz's text message to Stephanie as follows: "Counsel also said [Cruz] then sent Stephanie a text message that said I'm going to F up your dad. Well, that's before they knew [Cruz] had that text message. And the moment it was being presented, there was quite a reaction. But at the end of the day, the truth came out. And now the defense then changed it to oh, he actually called her, and that's when he threatened her. Why does it keep changing? Because it's simply not true. The defense will stop at nothing to say whatever they need to say --" At this point, Perez objected and the court admonished the prosecutor not to comment on defense motivations. Perez did not ask the court to admonish the jury. The prosecutor then remarked, "And the witnesses will say whatever they need to say to help in the defense of these three defendants."

The prosecutor concluded her arguments by urging the jury to consult the video -- including by watching it again during deliberations -- if it was unsure which testimony to believe.

F. *Verdicts and Sentencing*

In response to a jury request during deliberations, the surveillance video was replayed for the jury. The jury convicted Senior and Junior of the assault and battery counts (finding the great bodily injury allegation true), convicted Joseph of the lesser included offenses of simple assault and simple battery, and acquitted Senior of the threats and intimidation counts.

The court remanded the appellants to custody pending sentencing. Perez asked if the court was remanding Joseph, noting that he had no prior criminal record. The court confirmed it was, remarking, "I was watching the tape. And the tape speaks for itself, as they say."

At sentencing, the prosecutor asked the court to sentence Joseph to three years probation and to impose conditions prohibiting his possession of weapons and authorizing warrantless searches of his person and property. Perez objected, on the ground that Joseph's offenses were only misdemeanors and involved no weapons. The court sentenced Joseph to three years summary probation, with credit for 35 days actually served. It imposed probation conditions forbidding Joseph to own, use, or possess any dangerous or deadly weapons; requiring him to submit to

suspicionless searches by any peace officer at any time; and requiring him to obey all laws, orders of the court, and probation department rules.

DISCUSSION

A. *Denial of Day-of-Trial Request to Substitute Counsel*

Appellants argue the trial court's denial of their day-of-trial request for substitution of counsel violated their federal and state constitutional right to retain counsel of their choice.

1. *Standard of Review*

"[W]e apply an abuse of discretion standard of review to a trial court's denial of a motion to relieve [or substitute] retained counsel." (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1411 (*Dowdell*).) "The erroneous denial of a motion to substitute counsel constitutes structural error and mandates reversal of the defendant's conviction without requiring a showing of prejudice." (*Ibid.*)

2. *Governing Principles*

"A defendant who seeks to discharge [or substitute] retained counsel in a timely manner ordinarily must be permitted to do so." (*Dowdell*, *supra*, 227 Cal.App.4th at p. 1411.) A trial court has discretion to deny a motion to substitute retained counsel "'if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice."'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 311 (*Verdugo*),

quoting *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) In exercising this discretion, the trial court must avoid "'a myopic insistence upon expeditiousness in the face of a justifiable request for delay,'" as such insistence "'can render the right to defend with counsel an empty formality.'" (*Ortiz*, at p. 984, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 207 (*Crovedi*).)

On the other hand, a trial court has "'wide latitude in balancing the right to counsel of choice against . . . the demands of its calendar.'" (*Verdugo*, *supra*, 50 Cal.4th at p. 311, quoting *U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 152; see also *Crovedi*, *supra*, 65 Cal.2d at p. 208 [suggesting right to counsel of choice does not permit defendants "to abuse the patience of the court through dilatory efforts to seek counsel"].) "'[A] defendant who desires to retain his own counsel is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory or if he arbitrarily desires to substitute counsel at the time of the trial.'" (*Dowdell*, *supra*, 227 Cal.App.4th at p. 1411, quoting *People v. Blake* (1980) 105 Cal.App.3d 619, 623-624 (*Blake*).) It is "well settled" that where a defendant "has been provided a reasonable opportunity to obtain counsel of his own choice, no abuse of discretion occurs if the trial court fails to grant an additional continuance [for that purpose] at or after the commencement of the trial. [Citations.]" (*Blake*, at pp. 624-625; accord, *People v. Reaves* (1974) 42 Cal.App.3d 852, 856 (*Reaves*) ["Needless to say, there is a limit to how

often a defendant may continue his trial even on the basis that he desires to obtain different counsel"].)

3. *Analysis*

The trial court did not abuse its discretion in denying appellants' day-of-trial request to substitute counsel on the basis of its finding that the request was an untimely delay tactic. The court confirmed appellants' intent to proceed with Perez as their counsel four months before trial, after the court had already granted three continuances at appellants' request -- including two for the express purpose of allowing appellants to seek separate counsel. In the intervening months, during which the court granted appellants' fourth request for a continuance, appellants never hinted they desired new counsel. Instead, they waited until the day of trial to ask the court to substitute in three new attorneys, two of whom never appeared in court and admitted, through their proxies, that they were not ready to proceed on the day of trial. The trial court acted within its discretion by deeming the substitution request an attempt to further delay trial. (See *Blake*, *supra*, 105 Cal.App.3d at p. 624 [no abuse of discretion in denying continuance after trial commenced because defendant "was granted several continuances . . . and was given numerous opportunities to hire an attorney of his own choice"]; *Reaves*, *supra*, 42 Cal.App.3d at p. 856 [no abuse of discretion in denying continuance requested "on the very day of trial, after the matter ha[d] been pending for five months and the defendant

ha[d] . . . successfully obtained numerous continuances without indicating that there existed any reason to change attorneys"].)

It is true that the afternoon of the first day of trial, Perez claimed Tooson was ready to proceed as substitute counsel -- albeit for a different appellant than the one he originally sought to represent. However, Tooson made no specific representations concerning his readiness when he requested substitution of himself, Aizman, and Sterling that morning. Instead, he gave the court reason to doubt his readiness by admitting that he had been contacted by appellants only the evening before. Moreover, neither Perez nor Tooson requested substitution of Tooson alone. Rather, they asked the court to additionally allow the substitution of Aizman and Sterling -- neither of whom was present. The court was not required to accept, on faith, their representations of absent attorneys' readiness. Indeed, such faith would have been misplaced. Perez claimed Aizman would be ready for trial at 1:30 p.m. the next day -- only to admit, the next day, he did not even know who Aizman was. Further, Perez's renewed substitution request made no mention of Sterling, who, through yet another attorney (Kwatcher), requested an additional continuance the next morning. The apparent lack of coordination among the five attorneys involved gave the trial court additional reason to conclude substitution would delay trial yet again.

Contrary to appellants' contentions, the trial court was not required to find their request timely merely because they

made it shortly after receiving the prosecution's package plea offer. Neither Perez nor Tooson argued the offer was unforeseeable or rendered Perez incapable of effectively representing appellants. (See *People v. Jeffers* (1987) 188 Cal.App.3d 840, 848-851 [no abuse of discretion in denying day-of-trial request for continuance to retain new counsel, prompted by defendant's dissatisfaction with recent replacement of appointed counsel, where defendant had five months' notice of possible replacement and failed to show replacement counsel's inadequacy].) Moreover, Senior told the court appellants made their substitution request in response to the court's perceived surprise at appellants' joint representation, not in response to the plea offer. Four months had passed since the court last discussed the joint representation with appellants (at the April 17, 2017, arraignment), and they confirmed their intent to waive any conflict of interest. Senior's representation to the court therefore supported the court's conclusion that the plea offer was not a dramatic change in circumstances.[4]

Cases on which appellants rely are distinguishable. In several, the defendants made their substitution requests before trial. (See *People v. Lopez* (2018) 22 Cal.App.5th 40,

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[4] There is no merit to Senior's argument premised on the written waiver's purported conferral of "authority" to obtain separate counsel at "any time." The written waiver advised appellants of a right to "seek" separate representation at any time, not to obtain it upon demand. In any event, appellants and their counsel could not restrict the court's discretion by private agreement.

44 [week preceding trial]; *Ortiz*, *supra*, 51 Cal.3d at p. 987 [after mistrial but "well before" second trial]; *People v. Courts* (1985) 37 Cal.3d 784, 792 [more than a week before trial]; see also *id.* at p. 792, fn. 4 [distinguishing cases in which defendants made their requests on the day or eve of trial].) To the extent the courts excused defendants for requesting new counsel only at trial, they relied on extenuating circumstances not present here. (See *People v. Lara* (2001) 86 Cal.App.4th 139, 162-163 (*Lara*) [defense counsel's failure to consult with defendant prevented defendant from discovering counsel's lack of preparation until day of trial];[5] *Courts*, *supra*, at p. 793 & fn. 6 [defendant's new counsel diligently attempted to calendar continuance request before trial and failed only due to "inexplicable opposition" from the court]; *People v. Byoune* (1966) 65 Cal.2d 345, 347-348 & fn. 1 [prosecution's addition of more serious charge the day before trial justified day-of-trial request for new counsel].) Moreover, none of the cases addressed a request, like appellants', made after the court had already granted four continuances, including two for the purpose of seeking new counsel, solely at the request of the defense. (See *Lopez*, at p. 44 [prior continuances granted for defense but also for prosecution, and none for seeking new

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[5] *Lara* is further distinguishable because the trial court there did not consider whether the motion was timely, instead denying it for failure to establish a "breakdown in the attorney/client relationship." (*Lara*, *supra*, 86 Cal.App.4th at p. 148.) The Court of Appeal reversed due to the trial court's application of an erroneous legal standard. (*Id.* at p. 166.)

counsel]; *Lara*, at pp. 145-146, 162 [same]; *Courts*, *supra*, at p. 792 [defendant requested only one prior continuance, unsuccessfully and for discovery purposes].)

B. *Defense Counsel's Joint Representation*

Appellants contend Perez's joint representation of all three appellants violated their federal and state constitutional right to "representation free from 'conflicts of interest that may compromise the attorney's loyalty to the client and impair counsel's efforts on the client's behalf.'" (*People v. Johnson* (2018) 6 Cal.5th 541, 578, quoting *People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

1. *Governing Principles*

"[A] defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 483, fn. 5 (*Holloway*).) To preclude a conflict of interest claim on appeal, "the waiver must be a knowing and intelligent act "'done with sufficient awareness of the relevant circumstances and likely consequences.'"" (*People v. Baylis* (2006) 139 Cal.App.4th 1054, 1067 (*Baylis*), quoting *People v. Mroczko* (1983) 35 Cal.3d 86, 109-110 (*Mroczko*).)

In the absence of waiver, the standard for evaluating a conflict of interest claim arising from joint representation of criminal codefendants depends upon the timeliness of the appellant's objection. Reversal is automatic where the trial court, without expressly finding there is no conflict, denies a

timely request for separate counsel. (*Mickens v. Taylor* (2002) 535 U.S. 162, 168 (*Mickens*) [automatic reversal required "only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict"], citing *Holloway*, *supra*, 435 U.S. at p. 488.) Otherwise, reversal is required only upon a showing that a conflict of interest adversely affected counsel's performance. (See *People v. Doolin* (2009) 45 Cal.4th 390, 417-419 (*Doolin*); accord, *People v. Rices* (2017) 4 Cal.5th 49, 64 [trial court's inadequate inquiry into potential conflict of interest does not require reversal absent adverse effect on counsel's performance].) To determine whether a defendant has shown such an adverse effect, the reviewing court must "'"examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission."'" (*People v. Johnson*, *supra*, 6 Cal.5th at p. 578, quoting *Doolin*, *supra*, 45 Cal.4th at p. 418.)

2. *Waiver*

Appellants' written and oral waivers of Perez's potential conflict of interest do not preclude their conflict of interest claim because the record does not establish the waivers were knowing and intelligent. The language of the written waiver was both perfunctory and circular: it stated a potential conflict of interest existed because facts creating

a conflict of interest might arise. Although it mentioned such facts could arise against any appellant or all of them, it did nothing to explain what those facts might be, how they might arise, or how they might affect any or all appellants. The written waiver was therefore insufficient to preclude appellants' conflict of interest claim. (See *Baylis*, *supra*, 139 Cal.App.4th at p. 1068 [written waiver insufficient because it did not "specifically address any of the potential adverse consequences of the representation"].) Similarly, the trial court's colloquies concerning the potential conflict of interest identified none of its potential consequences. The record thus does not establish that appellants' oral waivers were knowing and intelligent. (See *People v. Easley* (1988) 46 Cal.3d 712, 729-731 [no sufficient waiver, despite discussions of potential conflict with defendant at four hearings, where trial court "identified only a minor portion of the potential consequences"], disapproved on another ground in *Doolin*, *supra*, 45 Cal.4th at p. 421 & fn. 22.)

3. *Timeliness*

The trial court's denial of appellants' request for separate counsel does not warrant automatic reversal because the request was untimely. (See *Mickens*, *supra*, 535 U.S. at p. 168, citing *Holloway*, *supra*, 435 U.S. at p. 488.) We rely on our analysis of the request's untimeliness set forth above, in our discussion of appellants' assertion of their right to choice of retained counsel. We add only that appellants' reliance on *Holloway* is misplaced. There, the

United States Supreme Court held jointly represented codefendants were entitled to automatic reversal of their convictions due to the trial court's denial of their "timely" motions for separate counsel, one of which they made "weeks before trial." (*Holloway*, at pp. 476, 484.) Their second, renewed motion was based on counsel's representation that an actual conflict existed because of the codefendants' "newly formed" decision to testify. (*Id.* at p. 484, fn. 7.) The Court expressly noted its holding would not impair trial courts' ability to deal with untimely motions for separate counsel made for dilatory purposes. (*Id.* at pp. 486-487.) As explained above, here the trial court acted within its discretion in finding appellants' day-of-trial request for separate counsel untimely and dilatory.

4. *Effect on Counsel's Performance*

Appellants argue the division of Perez's loyalty among them adversely affected his performance throughout plea negotiations, trial, and sentencing.

a. *Plea Negotiations*

Appellants fail to show a conflict of interest adversely affected Perez's performance in plea negotiations because the record does not show competent, unconflicted counsel would have adopted a different strategy than Perez in the negotiations. (See *Mai*, *supra*, 57 Cal.4th at p. 1014 ["The record does not show that a different strategy would likely have been adopted by competent, unconflicted counsel.

Hence, it fails to demonstrate either conflict-driven adverse performance, or ineffective assistance, on counsel's part"].) Contrary to Joseph's assertion, the record does not show Perez gave any appellant "advice that was directly adverse to the interests of another client." Indeed, the record is silent on the advice Perez provided each appellant and, more generally, on his strategy in the negotiations.[6]

Junior's and Joseph's reliance on *Mroczko*, *supra*, 35 Cal.3d 86 is misplaced. To the extent we could read *Mroczko* to support their position, it is no longer good law. (See *Doolin*, *supra*, 45 Cal.4th at pp. 419-421 & fn. 22 [expressly disapproving *Mroczko* to the extent it applied state constitutional standard requiring reversal upon "informed speculation" of adverse effect].) In *Mroczko*, our Supreme Court held a defendant received ineffective assistance of counsel as a result of his trial counsel's concurrent representation of his codefendant and of an uncharged suspect. (*Mroczko*, at p. 92.) After a lengthy discussion of the conflict of interest's effect on counsel's trial performance,

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[6] Even if the record had been more revealing, appellants would have faced a difficult burden -- the United States Supreme Court has noted the virtual impossibility of assessing, on an appellate record, "the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations." (*Holloway*, *supra*, 435 U.S. at p. 491; cf. *Cuyler v. Sullivan* (1980) 446 U.S. 335, 349 [explaining the Court affirmed denial of habeas corpus relief in *Dukes v. Warden* (1972) 406 U.S. 250 because the defendant failed to identify any "actual lapse in representation" in counsel's advice to enter a guilty plea, despite counsel's subsequent use of the plea to seek leniency for other clients].)

the Court briefly discussed a package plea offer with harsher terms for the defendant than for his codefendant, noting their joint counsel "was in no position to lean on one client on behalf of the other." (*Id.* at pp. 105-108.) The Court admitted, however, it could "only speculate what would have happened if the two defendants had been separately represented," and made no comment on what the record showed unconflicted counsel could, should, or would have done differently in the plea negotiations. (*Id.* at p. 108; see also *id.* at pp. 107-108 [recognizing separate trial counsel "might have made precisely the same tactical decisions"].) Thus, to the extent the holding in *Mroczko* depended on the Court's discussion of the package plea offer, it is inconsistent with the Court's later recognition that a reviewing court may not rely on a "defendant's unsubstantiated speculation" to find an adverse effect on counsel's performance. (*Mai*, *supra*, 57 Cal.4th at p. 1018.)

b. *Defense Strategies*

Senior and Joseph argue Perez's loyalty to all three appellants impaired his performance at trial by causing him to forego strategies that would have helped one at the expense of one or both of the others. Specifically, Senior argues his separate counsel would have shifted blame to Junior by arguing Junior was a "more violent aggressor" and the more likely cause of Cruz's injuries. Joseph argues his separate counsel would have disassociated him from Senior and Junior -- who, unlike him, actually struck Cruz -- by

moving for separate trials or juries and by more effectively arguing he lacked intent to aid and abet the beating.

We will not lightly assume competent separate counsel would have pitted appellants against each other. Indeed, we have explained such strategies often reflect poorly on separate counsel's competence: "In a criminal case one calls to mind many instances wherein joint defendants, though with some conflict in interests, are better served by a single attorney than by separate counsel. All too frequently, overzealous counsel for separate defendants attack the memory or credibility of a codefendant in the mistaken belief they thus better serve their own client. In effect, such defense lawyer becomes a prosecutor. A legal dogfight results in which neither defendant is helped and the prosecution is greatly aided." (*People v. Bryant* (1969) 275 Cal.App.2d 215, 224.)

Here, the record reveals potential tactical reasons, other than Perez's asserted conflict of interest, to decline to emphasize Junior's greater use of force. First, the video showed that Senior, after punching Cruz in the head, resumed striking him, even after Junior started beating Cruz, and continued beating him alongside Junior. Because Senior joined in Junior's use of force, emphasizing its degree risked emphasizing Senior's own culpability. Second, Senior and Junior pursued complementary defenses -- each claimed his use of force was justified as an effort to defend Senior from Cruz. Emphasizing the degree of force used by Junior and connecting it to Cruz's injuries would imply he used

unreasonable force, undermining Junior's defense and, by extension, Senior's. (See *People v. Ontiveros* (1975) 46 Cal.App.3d 110, 119 ["The defenses of the [jointly represented] defendants were similar and complementary, each claiming to be the victim of an unprovoked attack. . . . Separate counsel would have presented the same defense and would have had no reason to attack the credibility of the other defendants"].) Finally, the video showed Senior was the initial aggressor, leaving doubt whether Junior would have struck Cruz at all if Senior had not done so first. Thus, any attempt by Senior to shift the blame onto his son could undermine his credibility before the jury or before the court at sentencing. (Cf. *Mai*, *supra*, 57 Cal.4th at p. 1037 ["[T]he record discloses no ground to conclude that counsel rendered adverse or deficient assistance if they advised defendant to preserve credibility at a penalty trial by allowing his counsel to tell the penalty jury he 'ha[d] done the right thing' by not contesting guilt"].)

The record also reveals potential tactical reasons, other than Perez's asserted conflict of interest, to decline to further disassociate Joseph from Senior and Junior. If the jury believed Senior's and Junior's claims that they intended only to defend Senior from Cruz, the jury would have had no basis to find Joseph alone intended an unjustified assault and battery. Thus, Senior's and Junior's defenses complemented Joseph's, providing a tactical reason not to request separate trials or juries. (Cf. *People v. Cleveland* (2004) 32 Cal.4th 704, 725-726 [even conflicting defenses do

not require separate trials, which are statutorily disfavored].) Joseph is vague concerning the additional argument he contends competent separate counsel would have made on the issue of intent. His most specific suggestion is that separate counsel, unlike Perez, would have argued the video demonstrated Joseph's "conflicted intent and indecisiveness" by showing Joseph "took steps back or away from the fight." Although the video does show Joseph took three steps away from the beating, he did so after remaining in position during Senior's initial shove and punch, continuing to remain there while Junior initiated the joint beating, and picking up Junior's fallen hat. Moreover, Joseph returned to the ongoing beating after his three short steps away. Highlighting his steps away risked also highlighting his deliberate return, which the jury might interpret as stronger evidence of intent than his initial proximity.

Because the record "does not disclose that competent, unconflicted counsel would likely have pursued" the trial strategies identified by Senior and Joseph "or that any conflict of interest actually influenced [Perez's] decision not to do so," they have "not demonstrated counsel's conflict-related adverse performance in this respect." (*Mai*, *supra*, 57 Cal.4th at p. 1017.)

c. *Developing and Excluding Evidence*

Appellants argue separate counsel would have better served their interests in developing and excluding evidence. Appellants face a difficult burden because "'[s]uch matters as whether objections should be made and the manner of cross-examination are within counsel's discretion and rarely implicate ineffective assistance of counsel.'" (*Mai*, *supra*, 57 Cal.4th at p. 1018, quoting *People v. McDermott* (2002) 28 Cal.4th 946, 993.)

Joseph fails to show separate counsel would have more effectively cross-examined Corporal Lee regarding his opinion that Joseph served as a lookout. Perez did challenge Corporal Lee on this point during cross-examination, securing his admission that bystanders had a plain view of the beating. Junior "points to no exculpatory or impeachment evidence that further examination would have elicited." (*Mai*, *supra*, 57 Cal.4th at p. 1018.) As we discuss below in our analysis of Joseph's contention that insufficient evidence supported his convictions, the jury could reasonably have inferred from the video that Joseph stood ready to watch for interference from bystanders. The video therefore deprived counsel of effective options for impeaching Corporal Lee's opinion, providing a tactical reason to avoid dwelling on it.

Junior impermissibly speculates that his separate counsel would have elicited additional testimony from Senior -- and from Joseph, if Joseph chose to testify when represented by separate counsel -- to support Junior's "defense of another" theory. He fails to identify the

additional testimony available or to explain why separate counsel would likely have elicited it. (See *Mai*, *supra*, 57 Cal.4th at pp. 1018-1019 [failure to impeach identification testimony did not show adverse effect, where record disclosed "no ground to conclude that any evidence to discredit this testimony existed, that defendant's counsel knew or should have known of such evidence, or that counsel would likely have produced it if competent and unconflicted"].)

Finally, appellants fail to show the asserted conflict of interest adversely affected Perez's performance with respect to evidence of gang membership and of Senior's prior assault on Cruz's daughter. Perez objected to the admission of this evidence, contradicting Senior's implication that Perez, seeking to benefit Junior and Joseph at his expense, welcomed its admission. Junior and Joseph, in turn, fail to show Perez's loyalty to Senior caused him to forego seeking a more explicit limitation of the gang evidence. The court admonished the jury, after Perez's foundation and hearsay objections, that Cruz's testimony concerning gang membership was offered only to show Cruz's state of mind. Given that Cruz's state of mind could not establish any element of the charges against Junior and Joseph (viz., assault and battery), the court's admonition implicitly limited the evidence to Senior. Even if hindsight suggests Perez could have objected on additional grounds, at additional times, or in a different manner, we cannot simply assume his failure to do so resulted from conflicting loyalty

to Senior. (See *Doolin*, *supra*, 45 Cal.4th at p. 423 [mere absence of any "discernable tactical explanation" for conflicted counsel's failure to interview prosecution witnesses did not show it could be "attributed only to the financial conflict defendant urge[d]"].)

d. *Sentencing*

Joseph fails to show separate counsel would have more effectively challenged the trial court's order remanding Joseph to custody pending sentencing. Perez did challenge the order, arguing Joseph had no prior criminal record. The court explained its decision by observing the video spoke for itself. Joseph fails to identify additional argument Perez likely would have made but for his allegedly conflicting loyalty.

There is no merit to Senior's argument that Perez's performance at sentencing was deficient for failure to emphasize Senior used less force than Junior. For the reasons explained above, the record shows tactical reasons, other than the asserted conflict of interest, for foregoing such emphasis. (Cf. *People v. Bryant*, *supra*, 275 Cal.App.2d at pp. 224-225 [noting codefendants' attacks on each other often cause "legal dogfight" benefitting only the prosecution, and concluding "any conflict of interests between [two codefendants at sentencing] was of small moment and separate counsel for them was not required"].)

In sum, appellants have failed to meet their burden of identifying, on the record before us, any action competent

separate counsel likely would have taken and which Perez omitted due to conflicting loyalties. (See *People v. Johnson*, *supra*, 6 Cal.5th at p. 578.)

C. *Evidence of Gang Membership and Prior Assault*

Appellants argue the trial court prejudicially erred by admitting Cruz's testimony concerning appellants' gang affiliation. Senior further argues the court prejudicially erred by admitting Cruz's testimony that Senior assaulted Cruz's daughter.

1. *Standard of Review*

We review rulings on the admissibility of evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724-725 (*Waidla*).) Unless erroneous admission of evidence violated due process by making the trial fundamentally unfair, reversal is required only if "it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

2. *Allegations of Error*

a. *Lack of Foundation*

We reject appellants' contention that the challenged evidence lacked foundation, finding the contention forfeited except with respect to the evidence of Senior's gang membership, which had sufficient foundation. Evidence lacks foundation if its admissibility depends on

unestablished preliminary facts. (See 3 Witkin, Cal. Evidence (5th ed. 2018) Presentation, § 61, p. 111.) Cruz's testimony that he lived with Mondo and Stephanie laid a foundation for his testimony that they told him Senior was affiliated with a gang. His testimony that he had previously met Senior laid a foundation for his testimony that he had seen Senior's tattoos. To the extent Junior and Joseph now claim the court erred in admitting evidence they were "all tatted," that claim of error was forfeited, as no objection to the testimony was raised below. (*People v. Merriman* (2014) 60 Cal.4th 1, 84.) Similarly, no foundational objection was raised to Cruz's testimony that Senior had assaulted his daughter. In any event, as explained below, the challenged evidence did not prejudice appellants.

b. *Hearsay*

Appellants' contention that the challenged evidence was improperly admitted hearsay is without merit. "Hearsay is evidence of a statement made by a declarant outside of court and offered in court for its truth." (*Waidla*, *supra*, 22 Cal.4th at p. 717, citing Evid. Code, § 1200, subd. (a).) The prosecution did not offer Cruz's testimony to prove any appellant in fact belonged to a gang; nor did it offer his testimony to prove Senior in fact assaulted Cruz's daughter. Instead, the prosecution offered the testimony to prove Cruz believed these allegations, contributing to the fear he allegedly experienced as a result of Senior's threat. Likewise, the prosecution did not offer Cruz's belief that

Senior's tattoos reflected gang membership to prove his interpretation true. Accordingly, Senior's reliance on *People v. Meraz* (2016) 6 Cal.App.5th 1162 and *People v. Sanchez* (2016) 63 Cal.4th 665 is misplaced. (See *Meraz*, at p. 1172 [explaining *Sanchez* established rule that case-specific out-of-court statements are hearsay when an expert "treats the content of those statements as true and accurate to support the [truth of the] expert's opinion"].) Moreover, as noted, the court instructed the jury that testimony regarding gang affiliation was relevant only to show Cruz's state of mind.

c. *Evidence Code section 352*

To the extent appellants now contend the trial court should have excluded the challenged evidence under Evidence Code section 352, based on a finding that its probative value was outweighed by its potentially prejudicial effect, this argument was forfeited. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 84.) Contrary to Junior's contention, Perez did not preserve these arguments for appeal at the Evidence Code section 402 hearing because his argument there concerned only foundation.

In any event, appellants' Evidence Code section 352 arguments are without merit. Despite the prejudicial potential of gang evidence, "'nothing bars evidence of gang affiliation that is directly relevant to a material issue.'" (*People v. Montes* (2014) 58 Cal.4th 809, 859, quoting *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.) Here, the issues

material to the criminal threats charge included whether Senior's alleged threat caused Cruz "reasonably to be in sustained fear for his . . . safety." (Pen. Code, § 422.) Evidence of Cruz's belief in appellants' gang affiliation was relevant to this issue. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 754-755 [defendant's reference to his gang membership, among other factors, reasonably placed victim in sustained fear].) Cruz's belief in the prior assault was relevant as well. (See *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1432 ["[E]vidence of defendant's past domestic abuse of both [the victim] and his former girlfriend. . . . further supported [the victim's] fears his threats were specific, unequivocal, and immediate"]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 ["The victim's knowledge of defendant's prior conduct [of looking inside her home] is relevant in establishing that the victim was in a state of sustained fear"].)

The evidence's probative value to the criminal threats charge distinguishes it from the evidence addressed in cases on which appellants rely. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227 (*Albarran*) [error to admit "panoply" of gang evidence irrelevant to charges and only tangentially relevant to gang allegations]; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 337, 343-345 (*Bojorquez*) [error to admit "wide-ranging testimony about gangs' criminal tendencies," but proper to admit gang membership evidence for impeachment]; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1495-1497 [error to admit gang evidence to impeach

immaterial testimony that could be impeached instead on two stronger grounds]; *People v. Perez* (1981) 114 Cal.App.3d 470, 476-477 [error to admit gang evidence for identification after other evidence already identified defendant and proved all charges].)

3. *Prejudice*

Even had we found error in admitting the gang and prior assault evidence, we would not find prejudice. Appellants fail to negate the presumption the jury considered Cruz's testimony concerning Senior's gang membership only with regard to Cruz's state of mind, as instructed. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 613 ["It is, of course, presumed the jury understood and followed the court's instruction in the absence of any showing to the contrary"].) Cruz's state of mind was relevant only to the criminal threats and witness intimidation charges against Senior, on which the jury acquitted him. Thus, there is no reasonable likelihood the gang evidence inflamed the jury's passions. (See *Williams*, at pp. 612-613 [no reasonable likelihood cumulative gang evidence inflamed jury's passions, where jury found gang allegation untrue and convicted defendant only of simple possession rather than possession for sale]; cf. *People v. Rogers* (2016) 245 Cal.App.4th 1353, 1368 [no prejudice from improper addition of charge based on defendant's use of machete, where jury acquitted defendant on added charge and on similar deadly weapon allegation].)

Even if the jury improperly considered the gang and prior assault evidence when evaluating the assault and battery counts, there is no reasonable probability the outcome would have been more favorable to appellants had the evidence been excluded. The prosecution case was strong because the video precluded appellants from effectively disputing most of their relevant actions. (See *People v. Davis* (1996) 42 Cal.App.4th 806, 813 [use of gang affiliation evidence "utterly harmless" where, inter alia, prosecution case was "ironclad because appellant committed the robbery on videotape"].) For example, although Senior and Cruz disputed who threw the first punch, the video showed Senior did. There is therefore little likelihood the jury relied on the gang or prior assault evidence, rather than on the video, to resolve this conflict between Senior's and Cruz's testimony. Indeed, the prosecutor's closing argument urged the jury to consult the video to resolve any doubts concerning credibility. Her argument made only passing reference to gang membership and to Senior's alleged threat to Cruz's daughter. Finally, the gang evidence concerned only membership, not gang activities.

These facts distinguish cases on which appellants rely. (See *Albarran*, *supra*, 149 Cal.App.4th at pp. 227, 232 [due process violated by "panoply" of gang evidence emphasized in prosecutor's argument]; *Bojorquez*, *supra*, 104 Cal.App.4th at p. 345 [finding prejudice where prosecution case depended on single witness, prosecutor emphasized witness intimidation by defendant's gang, and evidence about gang

activities suggested defendant engaged in same activities]; *People v. Maestas*, *supra*, 20 Cal.App.4th at pp. 1498-1501 [finding prejudice from "pervasive" gang-related testimony and argument, where prosecution "had no coherent theory of guilt" and defendants had unrebutted alibi defense].)

In sum, the admission of the gang and prior assault evidence was not prejudicial error. We therefore reject Joseph's related argument that the admission of the gang evidence affected appellants' substantial rights, as well as Senior's related argument that Perez's failure to object under Evidence Code section 352 constituted ineffective assistance of counsel.

D. *Allegations of Prosecutorial Misconduct*

Senior contends the prosecutor committed misconduct during closing arguments. Perez's failure to object to most of the alleged instances of misconduct -- and his failure to ask the court to admonish the jury concerning the one instance to which he did object -- forfeited Senior's misconduct claims. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275 (*Gonzales*).) Moreover, contrary to Senior's contentions, the prosecutor's allegedly improper comments were neither so pervasive as to excuse defense counsel's failure to object nor so provocative as to excuse defense counsel's failure to request an admonition. We nevertheless address the merits of Senior's misconduct claims to resolve Senior's alternative argument that Perez's omissions constituted ineffective assistance of counsel.

1. *Governing Principles*

To establish ineffective assistance of counsel, an appellant "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) To show deficient performance where the record does not explain why counsel acted or failed to act in the allegedly deficient manner, the appellant must show there was """"no conceivable tactical purpose""" for counsel's act or omission. (*Id.* at p. 675.) To show prejudice, the appellant must show a reasonable probability of a more favorable result but for the act or omission. (*Id.* at p. 676.)

2. References to Gang Membership and "Gangster Justice"

We reject Senior's claim that the prosecutor impermissibly smeared him as a gangster. The prosecutor argued Senior attacked Cruz to avenge Mondo's alleged abuse of Stephanie, characterizing this as "gangster justice." She also argued Senior was a dangerous man, referencing Senior's demonstrated willingness to beat Cruz in clear view of bystanders and Cruz's belief in Senior's gang membership. These characterizations were not so provocative or unsupported by the record as to constitute misconduct. (See *People v. Johnson* (2015) 61 Cal.4th 734, 780-781

[permissible for prosecutor to emphasize defendant's dangerousness by commenting he was feared by people who knew him]; cf. *Gonzales*, *supra*, 54 Cal.4th at p. 1275 [permissible for prosecutor to compare defendant to Ivan the Terrible and to concentration camp commandant, where defense counsel characterized defendant in opposite manner and evidence supported the characterizations].)

3. *Comment on Madelyn's Absence as Defense Witness*

Contrary to Senior's contention, the prosecutor committed no misconduct in commenting on the defense's failure to call Stephanie's daughter Madelyn as a witness. The defense argument relied on Senior's and Junior's testimony that Cruz told them Stephanie deserved the abuse to which she had testified. In rebuttal, to support her challenge to Stephanie's credibility, the prosecutor suggested the defense did not call Madelyn as a witness because if she had testified, it would have become clear the 11-year-old had not actually written the statement accusing Mondo of abuse. This argument was permissible. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 90-91 [permissible for prosecutor to argue defense did not call witnesses to explain presence of car at crime scene because they could not have explained it without incriminating defendant], disapproved on another ground in *Doolin*, *supra*, 45 Cal.4th at p. 621 & fn. 22.)

The cases on which Senior relies are distinguishable. (See *People v. Hall* (2000) 82 Cal.App.4th 813, 816-817 (*Hall*)

[prosecutor told jury uncalled witness's testimony would have been the same as prosecution witness's testimony]; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825 [prosecutor presented "condensed version" of uncalled witness's hypothetical testimony].)

4. *References to Cruz's and Nathan's Testimony*

Senior fails to show the prosecutor asked the jury to imagine itself in Cruz's position, but persuasively argues she inappropriately asked it to imagine Nathan's suffering. "'[A]n appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt.'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1344 (*Seumanu*), quoting *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.) A similar appeal concerning the victim's family is "no less impermissible." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1199-1200 (*Vance*).)

The prosecutor made no appeal for sympathy by asking the jury to imagine what would have happened if Cruz had left his glasses on. The prosecutor did not ask the jurors to imagine themselves as Cruz, but instead to imagine how Cruz could have sustained greater injury if punched while still wearing his glasses. This was permissible. (Cf. *People v. Leon* (2015) 61 Cal.4th 569, 606 [no misconduct where prosecutor "did not invite the jury to place themselves in [the victim's] shoes or to imagine his suffering" but merely

"directed their attention to [the victim's] behavior in the surveillance video"].)

In contrast, the prosecutor should not have asked the jury to imagine how Nathan felt witnessing his father's beating. Nor should she have emphasized his suffering by immediately referencing his testimony that he felt like the beating went on forever. The video conclusively established the duration of the beating, leaving no need to establish it through Nathan's perception. Respondent implies the prosecutor's request permissibly supported her argument that Nathan's testimony was credible. However, the prosecutor did not explain how Nathan's feelings during the beating might have affected his testimony. Because she drew no connection between Nathan's feelings and any material issue, her request appeared to be an improper appeal for sympathy for Nathan's suffering. (See *Vance*, *supra*, 188 Cal.App.4th at p. 1200 [improper for prosecutor to make "something like a victim impact argument to get the jury to expand their empathetic scope to the suffering of the victim's family"].) Nevertheless, as explained below, Perez's failure to object to the request did not constitute ineffective assistance of counsel.

5. *Comments on Defense Tactics*

Senior's challenges to the prosecutor's comments on defense tactics are largely without merit. "'[T]he prosecutor is entitled to comment on the credibility of witnesses based on the evidence adduced at trial.'" (*People v. Young* (2005)

34 Cal.4th 1149, 1190 (*Young*), quoting *People v. Thomas* (1992) 2 Cal.4th 489, 529 (*Thomas*).) The prosecutor also "has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account," including by "highlight[ing] the discrepancies between counsel's opening statement and the evidence." (*People v. Bemore* (2000) 22 Cal.4th 809, 846 (*Bemore*).) However, a prosecutor may not attack defense counsel's integrity by implying defense counsel is free to deceive the jury or by accusing defense counsel of fabricating a defense. (*Ibid.*)

The prosecutor committed no misconduct by arguing Cruz had heard defense witnesses lie about him or by implying Stephanie had lied to protect her family members. These arguments were responsive to Perez's attack on Cruz's credibility, including his argument based on Cruz's hostile demeanor on the stand. There was evidence in the record to support the prosecutor's argument that certain defense witness testimony about Cruz, including an accusation that he lost a job due to fighting, was untrue. These comments fell within the scope of appropriate argument. (Cf. *Thomas*, *supra*, 2 Cal.4th at p. 529 [prosecutor permissibly commented witness would probably be charged with perjury if she were in town].)

The prosecutor permissibly, albeit crudely, commented on defense tactics by entreating the jurors not to fall for defense tricks or to allow "smoke [to] be blown up [their] behinds." She made this plea in the context of her argument that defense counsel had resorted to attacking the credibility

of prosecution witnesses because the facts, as established by the video, and the law of self-defense were unfavorable to appellants. This argument was permissible. (See *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781 [no misconduct where prosecutor "asserted that because the facts were against appellant, counsel had to 'obscure the truth' and confuse and distract the jury in order 'to manufacture doubt even where none exist[ed]'"].)

The prosecutor's comments on defense strategy crossed into impermissible territory only once, when she implied Perez's willingness to "stop at nothing" to help appellants led him to knowingly elicit false testimony from Stephanie. Specifically, she reminded the jury Perez had predicted in his opening statement that the evidence would show Cruz threatened Senior in a text message, but -- after learning Cruz still had the text message, which the jury saw made no such threat -- the defense accused Cruz of making the threat during a phone call instead. The prosecutor permissibly highlighted this discrepancy between the evidence at trial and defense counsel's opening statement. (See *Bemore*, *supra*, 22 Cal.4th at p. 846; *Young*, *supra*, 34 Cal.4th at pp. 1191-1192; *Thomas*, *supra*, 2 Cal.4th at pp. 529-530.) However, she should not have attributed the discrepancy to defense counsel's willingness to "stop at nothing," implying defense counsel had acted on that willingness by fabricating

new testimony upon disclosure of the text message.[7] (See *Bemore*, at p. 846.) Nevertheless, as explained below, Perez's failure to request an admonition concerning the prosecutor's "stop at nothing" comment did not constitute ineffective assistance of counsel.

6. *Prejudice*

Even had we found all of the prosecutor's challenged comments impermissible, we would not have found prejudice. As explained above, in our analysis of the prejudicial impact of the gang and prior assault evidence, the video alone established a strong prosecution case on the assault and battery charges. There is little probability the jury relied on the prosecutor's comments, rather than the video, to convict Senior. Indeed, the prosecutor herself emphasized the video as the best evidence, urging the jury to consult it to resolve any conflicting testimony. She thereby diminished the rhetorical impact of her comments on defense tactics and on Madelyn's failure to testify, which were

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[7] Cases on which respondent relies are distinguishable with respect to the prosecutor's "stop at nothing" comment. (See *People v. Johnson*, *supra*, 61 Cal.4th at pp. 782-783 [prosecutor argued defense counsel had tried to denigrate victims]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1155 [comment "was aimed solely at the persuasive force of defense counsel's closing argument, and not at counsel personally"]; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [comments "'were explicitly aimed at counsel's closing argument and statement, rather than at him personally'"].)

directed at the credibility of defense witnesses. In context, the prosecutor's challenged comments were not prejudicial. (See *Seumanu*, *supra*, 61 Cal.4th at pp. 1338, 1344 [inappropriate remarks, including improper appeal to view crime through victim's eyes, "could not have prejudiced defendant, especially given the strong evidence of his guilt"].)

Cases on which Senior relies are distinguishable. (See *People v. Johnson* (1981) 121 Cal.App.3d 94, 105 [verdict depended on resolution of credibility contest between defendant and victim]; *Hall*, *supra*, 82 Cal.App.4th at pp. 815-818 [prosecutor impermissibly bolstered credibility of sole witness at heart of prosecution case]; *People v. Gaines*, *supra*, 54 Cal.App.4th at pp. 825-826 [prosecution case depended on "less than ironclad" identification and inappropriate remarks "were a head-on assault at the defense"]; *Vance*, *supra*, 188 Cal.App.4th at pp. 1188, 1206 ["peculiar balance" of prosecution and defense evidence left case "teetering on a knife edge"].)

Because the prosecutor engaged in no prejudicial misconduct, Perez was not ineffective for failing to object or to request admonitions. (See *Gonzales*, *supra*, 54 Cal.4th at p. 1275; *Thomas*, *supra*, 2 Cal.4th at p. 531.)

E. *Sufficiency of the Evidence as to Junior and Joseph*

Junior contends insufficient evidence supported his assault and battery convictions, arguing the jury was required to accept his "defense of another" defense. Joseph

contends insufficient evidence supported his guilt as an aider and abettor.

1. *Standard of Review*

We review the sufficiency of the evidence supporting a conviction for substantial evidence, meaning evidence from which a reasonable factfinder could find the defendant guilty beyond a reasonable doubt. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1126.)

2. *Junior's Convictions*

Junior contends insufficient evidence supported his assault and battery convictions because the evidence required the jury to find he acted in justified defense of Senior. Any person may, in defense of another person who is about to be injured by a public offense, use "resistance sufficient to prevent" the offense. (Pen. Code, § 694.) This right to defend another is "closely related" to the right of self-defense. (*People v. King* (1978) 22 Cal.3d 12, 20, 22.) We therefore consult authority on self-defense, as do the parties. "[S]elf-defense is established when the defendant has an honest and reasonable belief that bodily injury is about to be inflicted on him, provided he uses force no greater than that reasonable under the circumstances." (*People v. Casares* (2016) 62 Cal.4th 808, 846, disapproved on another ground in *People v. Dalton* (2019) 7 Cal.5th 166, 214.)

There was substantial evidence from which the jury could have found Junior did not honestly and reasonably believe Cruz was about to inflict bodily injury on Senior. The video showed Junior leaping forward and punching Cruz immediately after Cruz defended himself by returning Senior's punch. Almost simultaneously, Senior resumed striking Cruz alongside Junior. Junior continued to pummel Cruz, who returned none of the blows, more than ten times. Given the speed with which Senior joined the beating, the jury could easily have dismissed Junior's self-serving testimony that he saw Senior "dazed" after Cruz punched him. (See *People v. Casares*, *supra*, 62 Cal.4th at p. 846 ["the state of the evidence did not obligate jurors to accept defendant's self-serving version of events"].)

Moreover, the jury could reasonably have rejected Junior's defense by finding he used an unreasonable degree of force. Junior acknowledges the video shows he threw "about a dozen or possibly a couple more punches," even appearing to concede this was "too many" punches. The jury could reasonably have found this degree of force excessive, particularly because Cruz testified -- and the video confirmed -- that Senior was the aggressor. (See *People v. Brady* (2018) 22 Cal.App.5th 1008, 1011 ["the jury may have determined that any threat to [the defendant] was not imminent or that the force he used was unreasonable given that video surveillance showed [the defendant] acting more aggressively than his victim"].)

We reject Junior's implication that his use of force could not have been unreasonable because it was limited to the use of fists "in a fist fight." Junior's characterization of his use of force is inaccurate because the video showed he continued to beat Cruz after any "fist fight" had ended. Further, it would be absurd to broadly rule the use of fists in "fist fights" reasonable, given that fists are readily capable of causing great bodily injury. (Cf. *People v. Chavez* (1968) 268 Cal.App.2d 381, 384 ["the cases are legion in holding that an assault by means of force likely to produce great bodily injury may be committed with fists. [Citations]"].) In any event, the reasonableness of force is not determined solely by the instrumentality used to exert it. (See *ibid.* [substantial evidence supported rejection of self-defense and defense of another claims regardless of whether defendant used fists or machete to inflict blows].)

Cases on which Junior relies are inapposite. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1060 (*Minifie*) [trial court erroneously excluded evidence of third party threats defendant associated with victim];[8] *People v. Ross* (2007) 155

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[8] Junior mistakenly implies that in *Minifie*, both the Court of Appeal and our Supreme Court deemed the defendant's use of force reasonable. On the contrary, the Supreme Court observed that even "[a]t its best, the claim of self-defense was not compelling," holding only that the erroneous exclusion of thirdparty threat evidence was prejudicial because the jury "might" have found it justified a stronger reaction than would otherwise have been reasonable. (*Minifie*, *supra*, 13 Cal.4th at p. 1071.)

Cal.App.4th 1033, 1049-1054 [insufficient evidence supported jury instruction on "mutual combat" precluding self-defense].)

3. *Joseph's Convictions*

Joseph contends the evidence was insufficient to support the jury's verdicts finding him guilty of simple assault and simple battery. The parties agree the theory of the prosecution's case was that Joseph acted as an aider and abettor. A person is guilty of a crime as an aider and abettor if, by act or advice, the person """aids, promotes, encourages or instigates""" its commission with """knowledge of the unlawful purpose of the perpetrator""" and """the intent or purpose of committing, encouraging, or facilitating the commission of the offense."""" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054, quoting *People v. Marshall* (1997) 15 Cal.4th 1, 40.)

Substantial evidence supported the jury's finding that Joseph aided and abetted the commission of simple assault and simple battery. The video showed Joseph took up a position near Cruz and Senior; briefly followed Junior to the other side of Cruz's car; returned to his position near Cruz and Senior; remained there while Senior poked and swatted at Cruz during an apparent argument; and gestured at Cruz in a manner implying he was speaking to him. The jury was entitled to believe Cruz's testimony that around this time, Joseph told Cruz that he (Cruz), his son, and his daughter were bitches. Based on this evidence, the jury could

reasonably have found Joseph acted in concert with Senior and Junior, implying a common purpose. (See *People v. Campbell* (1994) 25 Cal.App.4th 402, 409-410 [codefendants' "concerted action" of walking by victims together and returning to stop closely in front of them "reasonably implie[d] a common purpose"].) As the video further showed and as Nathan testified, Joseph remained in position as Senior and Junior jointly assaulted Cruz and picked up Junior's hat for him when it fell. The jury could reasonably have relied on this evidence to find Joseph assumed and maintained his position to intimidate Cruz, to block him, or to watch for interference from bystanders.[9] (See *id.* at p. 409 [jury could reasonably infer defendant "assumed his position in front of [the victims] to intimidate and block them, divert suspicion, and watch out for others who might approach," where defendant remained in front of victims while his codefendant robbed them at gunpoint and no evidence established he was surprised or afraid to intervene].) "Such conduct is a textbook example of aiding and abetting." (*Ibid.*)

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[9] Indeed, the jury could reasonably have inferred from the video that Joseph alerted Senior and Junior to increased attention from bystanders. The video showed Joseph, after taking three short steps away from the beating, returning to resume his position near Senior and Junior. Meanwhile, in the direction Joseph was facing, a man moved to view the beating from behind a neighboring gas pump and a car abruptly stopped nearby. Senior and Junior soon stopped striking Cruz.

F. *Joseph's Probation Conditions*

Joseph challenges the probation conditions prohibiting his possession of deadly or dangerous weapons and authorizing suspicionless searches of his person and property. He argues each condition is invalid because it is (1) unconstitutionally vague; (2) unconstitutionally overbroad; and (3) invalid under the test established by *People v. Lent* (1975) 15 Cal.3d 481. (See *People v. Moran* (2016) 1 Cal.5th 398, 403 (*Moran*) [confirming origin and vitality of *Lent* test].)

1. *Standard of Review*

We review probation conditions for abuse of discretion. (*Moran*, *supra*, 1 Cal.5th at p. 403.)

2. *Governing Principles*

A probation condition is unconstitutionally vague if it is insufficiently definite to inform the probationer what it requires or prohibits, or to enable the court to determine whether it has been violated. (*People v. Hall* (2017) 2 Cal.5th 494, 500.) A probation condition is unconstitutionally overbroad if it limits the exercise of constitutional rights and fails to "'closely tailor those limitations to the purpose of the condition.'" (*People v. Olguin* (2008) 45 Cal.4th 375, 384, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

A probation condition is invalid under the *Lent* test if the probationer shows the condition (1) has no relationship

to the crime of conviction; (2) relates to noncriminal conduct; and (3) requires or prohibits conduct not reasonably related to future criminality. (*Moran*, *supra,* 1 Cal.5th at p. 403.) Because the probationer must make all three showings, a *Lent* challenge fails if the condition is reasonably related to preventing future criminality. (*Moran*, *supra,* 1 Cal.5th at p. 403.)

3. *Analysis*

a. *Weapons Condition*

We reject Joseph's challenges to the weapons condition. The weapons condition is not unconstitutionally vague, despite failing to expressly predicate a violation on Joseph's knowledge that an item is a deadly or dangerous weapon, because a knowledge requirement is "manifestly implied." (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1183-1188; accord, *People v. Hall*, *supra*, 2 Cal.5th at pp. 502-503.) The weapons condition is not unconstitutionally overbroad because "[w]hen a probationer has been convicted of a violent crime, imposition of a strict condition of probation prohibiting ownership or possession of weapons is essential to promote public safety." (*People v. Forrest* (2015) 237 Cal.App.4th 1074, 1083.) For similar reasons, the condition is related to preventing future criminality and therefore satisfies the *Lent* test. (See *People v. Forrest*, *supra*, 237 Cal.App.4th at p. 1081.) Contrary to Joseph's contention, the condition need not be justified by evidence that Joseph possessed a weapon during his crimes of conviction or will

use a weapon in the future. (See *People v. Valdivia* (2017) 16 Cal.App.5th 1130, 1137-1138 [probation condition need not have specific connection to past criminal conduct and tendency to preclude similar, future conduct], review granted Feb. 14, 2018, S245893; accord, *People v. Wright* (2019) 37 Cal.App.5th 120, 131-132 (*Wright*).)

b. *Search Condition*

Joseph identifies no ground for declaring the search condition unconstitutionally vague or overbroad other than the possibility that the condition authorizes searches of electronic devices. We construe the condition to exclude such searches and therefore reject his constitutional challenges. (See *In re I.V.* (2017) 11 Cal.App.5th 249, 262 (*I.V.*) ["Giving the search condition its reasonable and practical construction, we conclude that it extends only to *tangible* property, and not to electronic data. As so construed, the condition is not unconstitutionally vague"].) The Electronic Communications Privacy Act (ECPA) limits government access to "electronic device information." (Pen. Code, § 1546.1, subd. (a).) Since January 1, 2017, an exception to this limitation has authorized access where the device is seized from an authorized possessor "subject to an electronic device search as a clear and unambiguous condition of probation." (*Id.*, § 1546.1, subd. (c)(10); Stats. 2016, ch. 541, § 3.5.) Because the trial court imposed Joseph's search condition after the effective date of this exception, without unambiguously authorizing electronic device searches, it is

reasonable to construe the search condition to exclude such searches. (See *People v. Guzman* (2018) 23 Cal.App.5th 53, 61 ["after the ECPA went into effect, even an unqualified general search condition is reasonably construed as precluding searches of electronic devices"]; accord, *I.V.*, *supra*, 11 Cal.App.5th at p. 262 & fn 16.) We need not modify the condition to make this implicit limitation explicit. (*I.V.*, at p. 263.)

The search condition is related to preventing future criminality, and therefore valid under the *Lent* test, because it facilitates monitoring Joseph's compliance with the probation condition requiring him to obey all laws. (See *People v. Valdivia*, *supra*, 16 Cal.App.5th at pp. 1138-1139 ["The electronic storage device search condition -- like the rest of the search conditions (to which defendant did not object) -- serves to enable defendant's probation officer to supervise him effectively by helping the probation officer ensure that defendant is complying with the conditions of his probation by obeying *all* laws, not just the law he previously disobeyed when he assaulted his wife"]; accord, *Wright*, *supra*, 37 Cal.App.5th at pp.129-134.) Joseph cites no authority supporting his suggestion that the condition cannot facilitate such monitoring because he "was placed on summary probation, and [was] not required to report to a probation officer." Proper supervision is not limited to regular meetings with a probation officer, but instead extends to "unscheduled" visits and "unannounced" searches. (*People v. Olguin*, *supra*, 45 Cal.4th at p. 381.) Joseph's

reliance on *People v. Burton* (1981) 117 Cal.App.3d 382 and *In re Martinez* (1978) 86 Cal.App.3d 577 is misplaced because both decisions relied on case law inconsistent with subsequent binding authority. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574, 585-586, review granted Nov. 29, 2017, S244650.)

G. *Joseph's Undisputed Claims for Relief*

The parties agree that we should vacate Joseph's conviction for simple assault and modify his sentence to award him an additional 34 days of presentence conduct credit. "When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed." (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) Simple assault is a lesser included offense of simple battery. (*In re Ronnie N.* (1985) 174 Cal.App.3d 731, 734.)[10] Thus, as the parties agree, we must reverse Joseph's conviction for simple assault, which arises from the same conduct underlying his simple battery conviction. Pursuant to the parties'

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[10] In contrast, felony assault is not a lesser included offense of felony battery. (*In re Ronnie N.*, *supra*, 174 Cal.App.3d at p. 735.) Senior's and Junior's felony battery convictions therefore do not require reversal of their felony assault convictions. Senior and Junior do not argue otherwise.

agreement, we will also modify his sentence to award him an additional 34 days of presentence conduct credit.

DISPOSITION

We affirm Senior's and Junior's judgments in their entirety. We reverse Joseph's conviction for simple assault, affirm his conviction for simple battery, and affirm his sentence as modified to award him an additional 34 days of presentence conduct credit. We remand to the trial court with instructions to prepare an amended abstract of judgment reflecting Joseph's modified sentence and to forward a certified copy of it to the California Department of Corrections and Rehabilitation

NOT TO BE PUBLISHED IN THE OFFICAL REPORTS

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.